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WONG UONG KEE

v.

RHB INSURANCE BHD

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HIGH COURT SABAH & SARAWAK, KUCHING

ABDUL AZIZ RAHIM J

[SUIT NO: 22-191-2008-II]

27 JULY 2009

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CIVIL PROCEDURE: *Summary judgment - Application for - Recovery proceedings against defendant insurers - Duty of insurers to satisfy judgments against persons insured in respect of third party risks - Whether defendant insurers were duly given statutory notices - Whether defendants under obligation to pay judgment sums and costs awarded - Whether application allowed - Road Transport Act 1987, s. 96(2)*

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CIVIL PROCEDURE: *Stay of proceedings - Application for - Recovery proceedings against defendant insurers - Whether defendant could claim a right to subrogate into cause of action - Whether time barred - Whether stay would significantly prejudice plaintiff and cause immense delay to recovery action - Road Transport Act 1987, s. 96(2)*

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The plaintiff was a pedestrian knocked down by a Toyota Hilux Double Cab Vehicle and as a result of the accident sustained serious injuries, head injuries, loss and damage, which resulted in consequent permanent physical and psychological disabilities. Enclosure 13 was the plaintiff's application for summary judgment to be entered against the defendant. The proceedings herein were recovery proceedings against the defendant insurers pursuant to statutory notice/s duly given and the obligation to pay under s. 96(2) of the Road Transport Act 1987 all judgment sums interest and costs awarded in Bintulu Sessions Court ('the said action.'). Interlocutory judgment was properly entered in the said action. The judgment sums of RM2,110,648.69 and RM111,957.41 prayed herein were final judgment sums with interest and costs awarded in the action for which the defendants were obliged to pay. The plaintiff averred that prior to filing the said action, the plaintiff sent two separate letters dated 12 June 2007 and 20 June 2007 from the plaintiff's solicitors addressed to the defendant, which the defendant received. The plaintiff averred that the defendant was therefore given statutory notice/s in accordance with and/or pursuant to s. 96(2) of Road Transport Act 1987 of the plaintiff's intention to commence the said action against the

driver of the vehicle, one Ting Huong Nging and the registered owner of the vehicle, Company Jensun Construction Sdn Bhd claiming all damage and losses sustained in the said accident. The defendant however objected to the enforcement of the present action by the plaintiff. The defendant, submitting that this court should not grant summary judgment in the present action, argued that as the insurer, they should have been notified and kept on notice. The defendant claimed they had not been served with or notified of the interlocutory judgment, and that they were not served or given notice of the dates of the hearing of assessment of damages in Bintulu Sessions Court. As such, the defendant claimed that they were not liable for the damages awarded. Enclosure 22 was the defendant's application that there be a stay of all further proceedings, pending the hearing and disposal of the defendant's applications to set aside the interlocutory judgment in Bintulu Sessions Court and/or leave to appeal against the judgment for award of damages.

Held (allowing plaintiff's encl. 13 and dismissing defendant's encl. 22):

- (1) The insurers had chosen to ignore the action, although they had been notified repeatedly of the court hearings, and thus, due to their own ignorance, and lack of interest in the action, it was not their automatic right to reopen the action with the justification that they were not notified or kept on notice. The step which needed to be taken by the plaintiff, which was to give statutory notice of the proceedings to the defendant, was also satisfied, and the defendant had admitted to receiving the notice, by their letter dated 29 June 2007, when they responded to the plaintiff solicitors' letter dated 12 June 2007 confirming coverage of the said vehicle, their insured Company Jensun Construction Sdn Bhd and accident. (paras 20 & 21)
- (2) The Sessions Court would be *functus officio* if it were to set aside or vary the judgment which had already been obtained. The defendant (insurance company) could not step into the shoes of the insured driver, or the company, and claim a right to subrogate into a cause of action which had been now time barred. In addition to that, if the defendant wanted to be made a party in the Sessions Court, they should have applied to do so before the proceedings had concluded in the Sessions Court, and not now during the stage of the recovery. (paras 22 & 24)

- A (3) The plaintiff had afforded the defendant the fair opportunity to be heard when they gave them notice of the proceedings in the Sessions Court in Bintulu. The defendant's own deliberate attempt at ignorance could not now be used as a ground for staying the proceedings and setting aside a judgment. The defendant, being such a big commercial company should not be playing bullying tactics against the plaintiff, by choosing to ignore court proceedings, and leisurely taking their time to pay out, and then, using it as a grounds for staying the recovery proceeding. This would significantly prejudice the plaintiff and cause an immense delay to the recovery action. (para 25)
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- D (4) This court could not justify any reasonable ground for allowing a stay in the recovery proceeding, when the rights and health of a person was at stake, and when a victim of an accident case was suffering due to serious financial constraints due to the costs of his medical and care - one which should have been borne by the insurance company. The insured had not subrogated its rights to the defendant, the insurers and thus the defendant had no cause of action against the plaintiff as the matter before the Sessions Court had been concluded. (paras 25 & 26)
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Case(s) referred to:

- F *Buckland v. Palmer* [1984] 1 WLR 1109 (*refd*)
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC (*refd*)
Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appelas [2008] 2 CLJ 121 FC (*refd*)
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA (*refd*)
- G *Malaysia & Nippon Insurance Bhd v. Low Buck Ngoh & Anor* [2005] 7 CLJ 11 HC (*refd*)
The MV Brihope [1996] 4 CLJ 476 CA (*refd*)

Legislation referred to:

- Road Transport Act 1987, s. 96(2)
- H Rules of High Court 1980, O. 15 r. 6

Other source(s) referred to:

- Srinivasan, *Principles of Insurance Law*, 8th edn 2006, p 305
- I For the plaintiff - Shankar Ram (Francis Teron with him); M/s Thomas, Shankar Ram & Co
 For the defendant - Stanely Eddy; M/s Battenberg & Talma Advocates
 Reported by Suhainah Wahiduddin

JUDGMENT**Abdul Aziz Rahim J:**

[1] Encl. 13 - Plaintiff's application for summary judgment to be entered against the defendant.

[2] Encl. 22 - Defendant's application for stay of proceedings.

Brief Facts Of The Case

[3] On 29 September 2004 at about 2pm, the plaintiff, Wong Uong Kee, who was a pedestrian, was knocked down by a Toyota Hilux Double Cab Vehicle bearing the registration number QKN9978 at along Jambatan Tatau. The driver of the vehicle was one Ting Huong Nging, an agent servant and permitted driver of Jensun Contruction Sdn. Bhd. (The registered owner of the vehicle). It was alleged that the defendant's insured driver was negligent. The vehicle was insured by the defendant, RHB Insurance Berhad.

[4] As a result of the accident, the plaintiff sustained serious injuries, head injuries, loss and damage, which resulted in consequent permanent physical and psychological disabilities. The plaintiff sued herein by his mother and next friend, Lim Chew Kek @ Lim Ching Ling.

[5] The plaintiff commenced action in the Sessions Court against (1) Ting Huong Nging - the driver of the vehicle and (2) Jensun Construction Sdn Bhd - the registered owners of the vehicle. The learned Sessions Court judge delivered its ruling based on 100% liability and damages was awarded to the plaintiff, as well as the costs of the action to be taxed.

[6] The claim of the plaintiff in the present action arises out of the Sessions Court Case - Bintulu Sessions Court Summons No. 53-18-2007 (BTU) (hereinafter referred to as 'the said action') that had been concluded with damages assessed and costs taxed. The present action is for recovery proceedings of the judgment sums awarded to the plaintiff in the said action and for which the defendant insurers herein are liable to pay all judgment sums and costs pursuant to their statutory obligations under s. 96(2) of the Road Transport Act 1987.

A Enclosure 13

[7] Encl. 13 is the plaintiff's summons in chambers dated 24 October 2008 for an application for the following judgments to be entered against the defendant:

B **[8]** The total judgment in the sums of RM2,110,648.69 awarded in Bintulu Sessions Court Summons No. 53-18-2007 (BTU) which comprised the awards of special damages, general damages, pre-trial costs of care and supervision by the mother and post trial costs of care and supervision in an institution inclusive of interests calculated up to 30 September 2008 as per paras. 16(1-2) and 23(1-2) of the statement of claim:

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- D** 1. Taxed costs of RM111,957.41 awarded in the Bintulu Sessions Court Summons No. 53-18-2007 (BTU) as per paras. 16(3), 20 and 23(3) of the statement of claim; RM107,053.49 with interest at the rate of 8% per annum from 5 March 2008 (date of judgment) to 30 September 2008 comes to RM4,903.92 plus RM107,053.49 = RM111,957.41;
- E** 2. Alternatively, the sums of RM2,110,648.69 and RM111,957.41 or such sums as this court finds due and or owing;
3. Interest on the said judgment sum of RM2,110,648.69 at the rate of 8% per annum from 1 October 2008 till full and final settlement;
- F** 4. Interests on the said taxed cost of RM107,053.49 at the rate of 8% per annum from 1 October 2008 till full and final settlement;
- G** 5. Alternatively any such interest on judgment sums and allocatur or taxed costs awarded in Bintulu Sessions Court Summons No. 53-18-2007 (BTU);
6. Costs of this application and present action;
- H** 7. Any such further or other relief as this court deems fit and proper.

[9] The grounds for the application are:

- I** 1. The proceedings herein are recovery proceedings against the defendant insurers pursuant to statutory notice/s duly given and their obligation to pay under s. 96(2) of the Road

Transport Act 1987 all judgment sums interest and costs awarded in Bintulu Sessions Court Summons No. 53-18-2007 (BTU) (hereinafter referred to as 'the said action');

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2. Cause papers of the said action with the hearing dates were duly served on (a) Ting Huong Nging - the driver and (b) Jensun Construction Sdn Bhd - the company;

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3. Interlocutory judgment was properly entered in the said action dated 24 September 2007, final damages assessed and costs awarded was taxed;

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4. The judgment sums of RM2,110,648.69 and RM111,957.41 prayed herein are final judgment sums with interest and costs awarded in the action for which the defendants are obliged to pay;

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5. There are no *bona fides* defences open to the defendant herein;

6. Any purport defence/s are baseless, frivolous, vexatious and intended to delay the plaintiff's genuine claims herein;

7. On such further or other grounds as contained in the affidavit in support of Madam Lim Chew Kek @ Lim Ching Ling affirmed on 24 October 2008.

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[10] The plaintiff averred that prior to filing the said action, the plaintiff, by two separate letters dated 12 June 2007 and 20 June 2007 from the plaintiff's solicitors addressed to the defendant, which the defendant received (sent by A.R Registered Post to the defendant's registered/business address in Kuala Lumpur, and hand delivered to the defendant's place of business and business address at Kuching).

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[11] The plaintiff averred that the defendant was therefore, given statutory notice/s in accordance with and/or pursuant to s. 96(2) of Road Transport Act 1987 of the plaintiff's intention to commence the said action or contemplated claim against the said Ting Huong Nging and the Company Jensun Construction Sdn. Bhd claiming all damage and losses sustained in the said accident. The plaintiff also averred that the defendant by their letter dated 29 June 2007, responded to the plaintiff solicitors' letter dated 12 June 2007 confirming coverage of the said vehicle, their Insured Company Jensun Construction Sdn Bhd and accident and requested all relevant documents pertaining to the claim as well as their views on liability and quantum for its consideration.

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A [12] The defendant however objected to the enforcement of the present action by the plaintiff. Defendant filed defendant's outline submission - Encl. 44 dated 1 December 2008.

B [13] The defendant had on 17 November 2008, filed the following applications in the Sessions Court at Bintulu in the said action, and the applications are pending hearing in the Bintulu Sessions Court:

C (a) Notice of application to set aside the interlocutory judgment dated 24 September 2007 obtained in Bintulu Sessions Court Summons No. 53-18-2007 (BTU);

D (b) Notice of application for leave to appeal against the judgment for award of damages dated 14 March 2008 in Bintulu Sessions Court Summons No. 53-18-2007 (BTU);

[14] The defendant therefore submitted that this court should not grant summary judgment in the present action.

E [15] The defendant also argued that as the insurer, they should have been notified and kept on notice. The defendant claimed that they have not been served with or notified of the interlocutory judgment dated 24 September 2007 until the receipt of the letter of demand dated 3 October 2008 on 9 October 2008. The defendant also claimed they were not served or given notice of the dates of the hearing of assessment of damages in F Bintulu Sessions Court Summons No. 53-18-2007 (BTU). As such, the defendant claimed that they are not liable for the damages awarded under the judgment dated 14 March 2008.

G [16] The plaintiff then filed a reply supporting plaintiff's encl. 13 for summary judgment - encl. 46 - dated 1 December 2008.

Enclosure 22

H [17] Encl. 22 is defendant's summons in chambers dated 18 November 2008 which is an application that there be a stay of all further proceedings, pending the hearing and disposal of the defendant's applications to set aside the interlocutory judgment dated 24 September 2007 in Bintulu Sessions Court Summons No. 53-18-2007 (BTU) and/or for leave to appeal against the judgment for award of damages dated 14 March 2008 in Bintulu I Sessions Court Summons No. 53-18-2007 (BTU).

[18] The grounds for the application are *inter alia*, that the defendant has filed an application to set aside the interlocutory judgment dated 24 September 2007 in Bintulu Sessions Court Summons No. 53-18-2007 (BTU) and to set aside the judgment for award of damages dated 14 March 2008 in Bintulu Sessions Court Summons No. 53-18-2007 (BTU) and seek to stay all further proceedings until the disposal of the said applications to prevent such applications from being rendered nugatory in the circumstances of this case, where any payments made by the defendants to the plaintiff pursuant to the assessment of damages will not be recovered readily or at all.

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[19] The other grounds are as stated in the affidavit of S Kumaresan Saravanamuthu, the Senior Executive in the Claims Department of RHB Insurance Berhad, which was affirmed on 17 November 2008.

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Court's Ruling On Encls. 13 And 22

[20] It appears that although being notified repeatedly of the court hearings, that the insurers choose to ignore the action, and thus, due to their own ignorance, and lack of interest in the action, it is not their automatic right to reopen the action with the justification that they were not notified or kept on notice. Justice Low Hop Bing in *Malaysia & Nippon Insurance Bhd v. Low Buck Ngoh & Anor* [2005] 7 CLJ 11 held at p. 12 that "This was a recovery action by the plaintiffs against the defendant as the insurer pursuant to the judgment against the driver and his employer ...". "... Any attempt to set aside the judgment must be made by the driver and his employer in the proceedings in which the judgment had been given. The defendant herein as the insurer was not at liberty to reopen it by way of a collateral issue in this recovery action".

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[21] The step which needed to be taken by the plaintiff, which was to give statutory notice of the proceedings to the defendant, was also satisfied, and the defendant had admitted to receiving the notice, by their letter dated 29 June 2007, when they responded to the plaintiff solicitors' letter dated 12 June 2007 confirming coverage of the said vehicle, their insured Company Jensun Construction Sdn Bhd and accident.

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A [22] The Sessions Court would also be *functus officio* if it was to set aside or vary the judgment which has already been obtained. The Federal Court in *Hock Hua Bank Bhd. v. Sahari Bin Murid* [1980] 1 LNS 92 held that “Clearly the court has no power under any application in the same action to alter vary or set aside
B a judgment regularly obtained after it has been entered or an order after it is drawn up ...” JCA Mahadev Shankar held at p. 478 in *The M.V. Brihope* [1996] 4 CLJ 476 stated that “They could have intervened before 7 June 1994 but elected not to do so. Therefore, they were stopped from applying to set the judgment
C aside after it was passed.”

[23] His Lordship Gopal Sri Ram JCA (as he then was) held at pp. 401 and 402 in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 that “It is cardinal principle of law, that
D when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously.” “In all cases in which delay in approaching the court is an issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or
E reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.”

[24] Furthermore, the plaintiff objected to the stay as they argued that there was a time bar and therefore no existing cause of action can be subrogated into. Relying on *Srinivasan’s Principles of Insurance Law* (8th edn 2006) at p. 305, that “The right of subrogation does not arise where the assured himself has no cause of action against the third party” and Lord Justice Griffiths statement in *Buckland v. Palmer* [1984] 1 WLR 1109 at p. 1110
F that “An insurer who pays his insured under a comprehensive policy and then seeks by subrogation to recover the sum in the name of his insured can have no greater rights against the tortfeasor than those of this insured”, it is clear that the defendant (insurance company) cannot step into the shoes of the insured
G driver, or the company, and claim a right to subrogate into a cause of action which has been now time barred. In addition to that, if the defendant wanted to be made a party in the Sessions Court, they should have applied to do so before the proceedings had concluded in the Sessions Court, and not now during the stage
H of the recovery. The Federal Court in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121 at p. 123 held that “An application for leave to intervene in order to set
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aside an order for sale by a party not already a party to the proceedings must be made under O. 15 r. 6 of the Rules of High Court 1980 - 'The application may be made at any stage of the proceedings' - meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in, the judge also becomes *functus officio*." Therefore, the defendant who was not parties to the action in the Sessions Court can not turn around now and file an application regarding the action in which it was not a party to.

[25] I believe in these circumstances that the plaintiff had afforded the defendant, RHB Insurance Berhad, the fair opportunity to be heard, when they gave them notice of the proceedings in the Sessions Court in Bintulu. The defendant own deliberate attempt at ignorance can not now be used as a ground for staying the proceedings and setting aside a judgment. The defendant, RHB Insurance Berhad being such a big commercial company should not be playing bullying tactics against the plaintiff, by choosing to ignore court proceedings, and leisurely taking their time to pay out, and then, using it as a grounds for staying the recovery proceeding. This, I feel will significantly prejudice the plaintiff, and cause an immense delay to the recovery action. I cannot justify any reasonable ground for allowing a stay in the recovery proceeding, when the rights and health of a person is at stake, and when a victim of an accident case is suffering due to serious financial constraints due to the costs of his medical and care - one which should have been borne by the insurance company.

[26] The court, after much consideration of the facts, principles and the law, agree with the submissions by the learned counsel for the plaintiff that the insured had not subrogated its rights to the defendant, the insurers and thus the defendant has no cause of action against the plaintiff as the matter before the Sessions Court had been concluded. Therefore, I shall allow in terms as prayers 1, 2, 4, 5 and 7 of the summons in chambers encl. 13 and shall dismiss the defendant's application for stay of the application in the summons in chambers encl. 22. Costs of the action in encls. 13 and 22 to the plaintiff to be taxed unless agreed.

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